

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1497

To be argued by
DENISE COTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1497

UNITED STATES OF AMERICA,

Appellee,

—v.—

MOSES WEINDLING and PATRICIA MCINTYRE,
Defendants-Appellants.

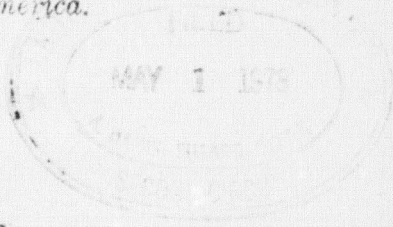
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DENISE COTE,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

B
P/S



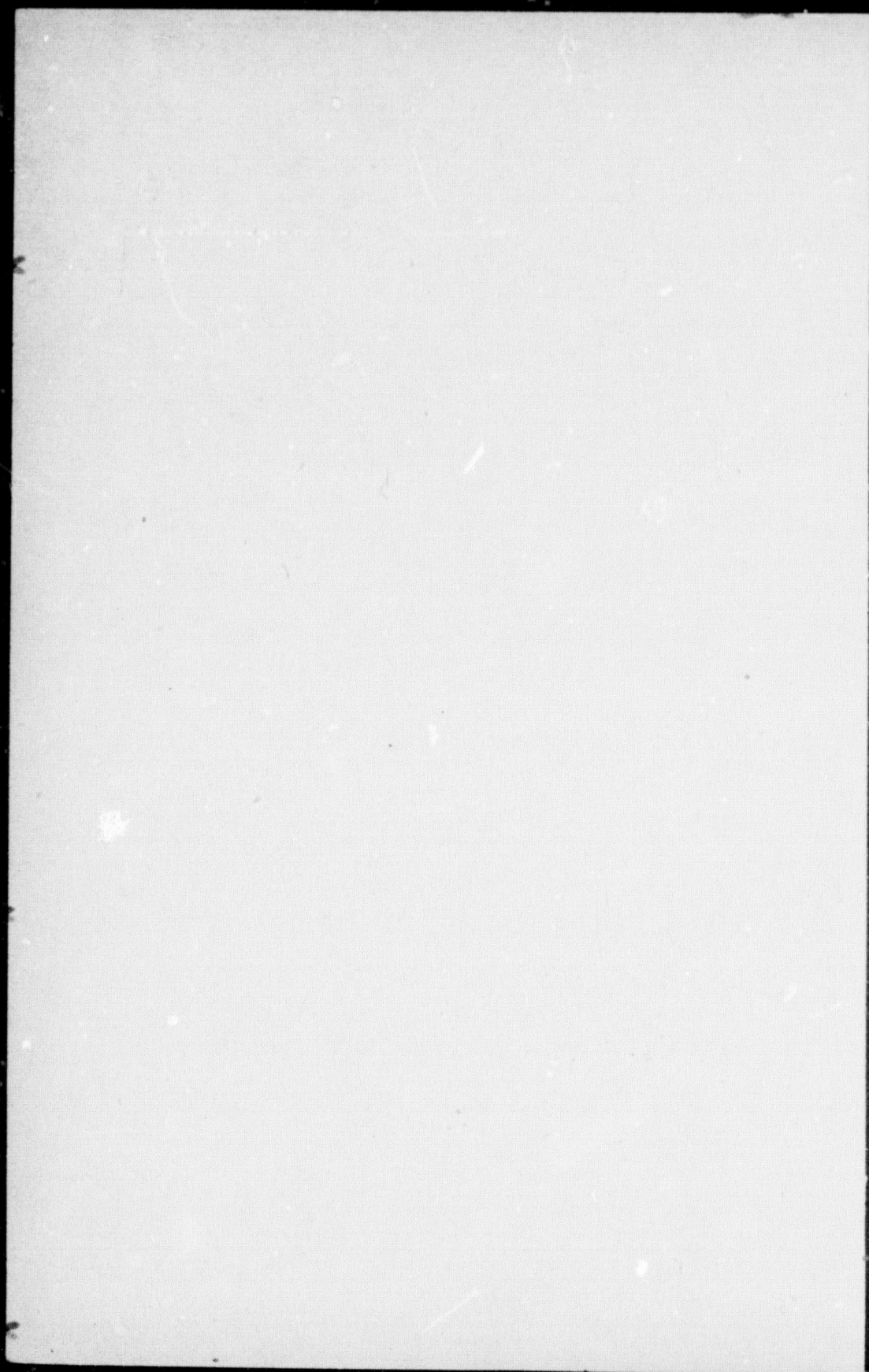


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defendants' Case	7
The Government's Rebuttal Case	9
ARGUMENT:	
POINT I—Evidence of Detective Minichiello's Prior Service Record Properly Was Received in Evi- dence	9
POINT II—The Government Properly Elicited Testi- mony Concerning the Identity of the Brunette	12
POINT III—The District Court Properly Excluded Post-Arrest Statements by Weindling Exculpat- ing McIntyre	16
POINT IV—The Cross-Examination of Defendant Mc- Intyre Was In All Respects Proper	22
A. The Playboy Bunny	22
B. The Number 357	25
C. The Triple Beam Scale	27
D. Airlines Passes and \$900	28
POINT V—The Evidence Was Sufficient That the De- fendants Possessed Three And One-Half Ounces of Cocaine	30
POINT VI—The Government's Summation Was Proper	32
CONCLUSION	37

TABLE OF CASES

	PAGE
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	35
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	18
<i>D'Ambrosio v. Fay</i> , 349 F.2d 957 (2d Cir.), <i>cert. denied</i> , 382 U.S. 921 (1965)	33
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	30
<i>Griffin v. California</i> , 380 U.S. 609 (1965)	33
<i>Haberstroh v. Montanye</i> , 493 F.2d 483 (2d Cir. 1974)	34
<i>Lawn v. United States</i> , 355 U.S. 339 (1958)	12
<i>Pennacchio v. United States</i> , 263 F. 66 (2d Cir.), <i>cert. denied</i> , 253 U.S. 497 (1920)	31
<i>Robertson v. United States</i> , 171 F.2d 345 (D.C. Cir. 1948) (<i>per curiam</i>)	14
<i>United States v. Agueci</i> , 310 F.2d 817 (2d Cir. 1962), <i>cert. denied sub nom., Guippone v. United States</i> , 372 U.S. 959 (1963)	31
<i>United States v. Atkins</i> , 473 F.2d 308 (8th Cir.), <i>cert. denied</i> , 412 U.S. 931 (1973)	31
<i>United States v. Badalamente</i> , 507 F.2d 12 (2d Cir. 1974), <i>cert. denied</i> , 421 U.S. 911 (1975)	25, 28
<i>United States v. Bagley</i> , 537 F.2d 162 (5th Cir. 1976), <i>cert. denied</i> , 429 U.S. 1075 (1977)	21
<i>United States v. Barrett</i> , 539 F.2d 244 (1st Cir. 1976)	18, 19, 20, 21
<i>United States v. Benedetto</i> , Dkt. No. 77-1306, slip op. 1735 (2d Cir., Feb. 24, 1978)	30
<i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 970 (1976)	31
<i>United States v. Borelli</i> , 336 F.2d 376 (2d Cir. 1964)	14

	PAGE
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), cert. denied, 431 U.S. 959 (1977)	17, 28
<i>United States v. Brawer</i> , 482 F.2d 117 (2d Cir. 1973), cert. denied, 419 U.S. 1051 (1974)	12
<i>United States v. Brown</i> , 547 F.2d 438 (8th Cir.), cert. denied sub nom., <i>Hendrix v. United States</i> , 430 U.S. 937 (1977)	29, 30
<i>United States v. Bubar</i> , 567 F.2d 192 (2d Cir.), cert. denied, — U.S. — (1977)	33, 34
<i>United States v. Cirillo</i> , 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056 (1974)	31
<i>United States v. Dardi</i> , 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845 (1964)	22
<i>United States v. DeAlesandro</i> , 361 F.2d 694 (2d Cir. 1966)	12
<i>United States v. DeLeon</i> , 561 F.2d 421 (2d Cir. 1977)	23
<i>United States v. DeMarco</i> , 488 F.2d 828 (2d Cir. 1973)	22
<i>United States v. Dioguardi</i> , 492 F.2d 70 (2d Cir.), cert. denied sub nom., <i>Ostrer v. United States</i> , 419 U.S. 829 (1974)	34
<i>United States v. Estremera</i> , 531 F.2d 1103 (2d Cir.), cert. denied, 425 U.S. 979 (1976)	12
<i>United States v. Evanchik</i> , 413 F.2d 950 (2d Cir. 1969)	22
<i>United States v. Fuentes</i> , 563 F.2d 527 (2d Cir. 1977)	25, 28
<i>United States v. Gallo</i> , 123 F.2d 229 (2d Cir. 1941)	14
<i>United States v. Glasser</i> , 443 F.2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971)	22

	PAGE
<i>United States v. Goodlow</i> , 500 F.2d 954 (8th Cir. 1974)	19
<i>United States v. Grant</i> , 545 F.2d 1309 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977)	32
<i>United States v. Guillette</i> , 547 F.2d 743 (2d Cir. 1976), cert. denied, — U.S. — (19)	20
<i>United States v. King</i> , 560 F.2d 122 (2d Cir.), cert. denied, — U.S. — (1977)	17
<i>United States v. LaSorsa</i> , 480 F.2d 522 (2d Cir.), cert. denied, 414 U.S. 855 (1973)	12
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	23
<i>United States v. Lewis</i> , 565 F.2d 1248 (2d Cir. 1977)	14
<i>United States v. Lewis</i> , 447 F.2d 134 (2d Cir. 1971)	22
<i>United States v. Lubrano</i> , 529 F.2d 633 (2d Cir. 1975), cert. denied, 429 U.S. 818 (1976)	11, 13
<i>United States v. Marchand</i> , 564 F.2d 983 (2d Cir. 1977)	14
<i>United States v. Marquez</i> , 462 F.2d 893 (2d Cir. 1972)	18
<i>United States v. Mejias</i> , 552 F.2d 435 (2d Cir. 1977), cert. denied, — U.S. — (19)	31
<i>United States v. Nathan</i> , 536 F.2d 988 (2d Cir.), cert. denied, 429 U.S. 930 (1976)	17
<i>United States v. Oropeza</i> , 564 F.2d 316 (9th Cir. 1977)	17, 18, 21
<i>United States v. Pena</i> , 527 F.2d 1356 (5th Cir.), cert. denied, 426 U.S. 949 (1976)	18
<i>United States v. Provoo</i> , 215 F.2d 531 (2d Cir. 1954)	14

	PAGE
<i>United States v. Robinson</i> , 560 F.2d 507 (2d Cir. 1977) (<i>en banc</i>)	25
<i>United States v. Robinson</i> , 544 F.2d 110 (2d Cir. 1976)	14
<i>United States v. Rodriguez</i> , 545 F.2d 829 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (19)	34
<i>United States v. Ruffin</i> , Dkt. No. 77-1160, slip op. 6565 (2d Cir., Feb. 27, 1978)	25, 30
<i>United States v. Santana</i> , 485 F.2d 365 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 931 (1974)	12
<i>United States v. Santos</i> , 385 F.2d 43 (7th Cir. 1967), <i>cert. denied</i> , 390 U.S. 954 (1968)	27
<i>United States v. Scholle</i> , 553 F.2d 1109 (8th Cir. 1977), <i>cert. denied</i> , — U.S. — (19)	11
<i>United States v. Seyfried</i> , 435 F.2d 696 (7th Cir. 1970), <i>cert. denied</i> , 402 U.S. 912 (1971)	18
<i>United States v. Spangelet</i> , 258 F.2d 338 (2d Cir. 1958)	35
<i>United States v. Stassi</i> , 544 F.2d 579 (2d Cir. 1976), <i>cert. denied</i> , 430 U.S. 907 (1977)	12, 35
<i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir.), <i>cert. denied</i> , 423 U.S. 832 (1975)	11, 12, 35
<i>United States v. White</i> , 553 F.2d 310 (2d Cir.), <i>cert. denied</i> , 431 U.S. 972 (1977)	18, 21

TABLE OF CROSS-REFERENCES**WEINDLING'S BRIEF**

POINT I
POINT II
POINT III
POINT IV
POINT V-1
POINT V-2
POINT V-3
POINT V-4
POINT V-5
POINT V-6
POINT V-7

GOVERNMENT'S BRIEF

POINT I
POINT II
POINT V
POINT IV-C
POINT VI
POINT VI
POINT I
POINT II
POINT VI
POINT VI
POINT VI

MCINTYRE'S BRIEF

POINT II
POINT III
POINT IV
POINT V-A
POINT V-B
POINT V-C

POINT III
POINT II
POINT II
POINT IV-A
POINT IV-D
POINT IV-B

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1497

UNITED STATES OF AMERICA,

Appellee,

—v.—

MOSES WEINDLING and PATRICIA MCINTYRE,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Moses Weindling and Patricia McIntyre appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on December 9, 1977, after a five day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 77 Cr. 476, filed June 23, 1977, charged Weindling and McIntyre in Count One with conspiracy to distribute and to possess with intent to distribute a Schedule II controlled substance, in violation of Title 21, United States Code, Section 846. Count Two charged Weindling and Count Three charged Weindling and McIntyre, with distribution and possession with intent to distribute of 1.45 grams and 4.1 grams of cocaine, respectively; Count Four charged both defendants with possession of 3½ ounces of cocaine with intent to dis-

tribute, all in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on October 25, 1977, and concluded on November 2, 1977, when the jury found both defendants guilty of all the counts in which they were charged.

On December 9, 1977, Judge Owen sentenced defendant Weindling to five years' imprisonment to be followed by five years special probation on each of the four counts, the sentences to be served concurrently. Defendant McIntyre was sentenced on Count One alone, pursuant to Title 18, United States Code, Section 5010(e), to the custody of the Attorney General for a 60 day period of observation, a study, and a report.

Weindling was remanded at the time of sentence and is serving his sentence. McIntyre is at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

The evidence at trial established that defendants Weindling and McIntyre conspired with each other to distribute and possess with intent to distribute cocaine. In the course of this conspiracy Moses Weindling delivered 1.45 grams of cocaine on April 27, 1977, to an undercover detective of the Task Force of the Drug Enforcement Administration, during a meeting at Sixish Restaurant. On the following day, April 28, 1977, at Grass Restaurant both defendants Weindling and Patricia McIntyre gave the same detective 4.1 grams of cocaine as a sample of a three and one-half ounce cocaine package in their possession which they intended to distribute to the detective.

On April 27, 1977, an informant and Detective Mini-chiello of the DEA Task Force, acting undercover as a

cocaine purchaser, met Moses Weindling at the Sixish Restaurant on the upper East Side of Manhattan. (Tr. 36-40, 343, 362).^{*} Following introductions by the informant, Weindling handed Detective Minichiello a sample of the "product" he was "dealing" and a coke spoon in order to let Minichiello "check it out." (Tr. 41, 83). The sample contained 1.45 grams of cocaine and was introduced into evidence at trial. (Tr. 385). After discussing the amount of cocaine he could sell (Tr. 46-47), Weindling called "his lady." (Tr. 47). A short while later Weindling left the restaurant and returned with Patricia McIntyre. (Tr. 48, 110, 287). With McIntyre seated at the table Weindling and Minichiello agreed that Weindling would sell three and one-half ounces of cocaine on the following day at Grass Restaurant, in return for \$3,400.00 and a bet of a "dollar a way, six dollars a day" for a month on a number.^{**} (Tr. 48-49). McIntyre promptly chose the number 357 as the number to be played in the continuing bet. (Tr. 48, 488-89).

Later the same day after the meeting at Sixish Restaurant, Weindling called Detective Minichiello by telephone and told him that he had four and one-half ounces of cocaine to sell for a price of \$4,500.00 and the promised month of gambling "action," because one of his other customers had cancelled. (Tr. 50-51).

On the following day McIntyre and Weindling arrived together in Weindling's car, entered Grass restaurant, and joined Minichiello and the informant, who were already waiting for them. (Tr. 51-52, 288-89). Weindling

^{*} "Tr." refers to the Trial Transcript; "App." to the Joint Appendix for the Government and defendant Weindling on appeal.

^{**} During the drug negotiations Detective Minichiello posed as a gambler who employed the informant in his wireroom. (Tr. 44, 83). In gambling parlance a bet of a "dollar a way" permits the bettor to win if the three digit number he plays appears in any of the six possible combinations of the digits. (Tr. 49).

advised Detective Minichiello that instead of the promised four and one-half ounces of cocaine he could only sell him three and one-half ounces, and that the three and one-half ounces, or "package," was in the restaurant, although not with either him or McIntyre. (Tr. 54, 101). Weindling then handed Minichiello a sample from the package, consisting of 4.1 grams of cocaine. (Tr. 54).^{*} Minichiello, however, asked to check out the "package" rather than the sample. Weindling told Minichiello that it would be inconvenient for McIntyre if he were to get the "package" at that moment, and assured his prospective buyer that the "package" was the same quality as the sample since the sample had come from the "package." McIntyre also reassured Minichiello about the quality of the package. She told him they had tried the "package" the night before and it was so good it had hurt her nose. (Tr. 56-57). Finally, Weindling informed Minichiello that he would have to charge him an extra \$50.00 because selling the cocaine at the restaurant, instead of out of his home, meant that he had to pay people to be at the restaurant. (Tr. 57).

Approximately two hours later, after they had finished lunch, McIntyre left the table and went to get the "package" of cocaine. She went downstairs to the women's restroom (Tr. 61, 155, 184-85, 213, 222-23), where she had a conversation that lasted at least four minutes, with a brunette.^{**} (Tr. 406-410). In the course of the con-

^{*} This cocaine sample was introduced in evidence at the trial. (GX 2; Tr. 387, 389).

^{**} Surveillance agents on duty observed the meeting between Minichiello and defendants. They also observed that the brunette with whom McIntyre met had arrived at the restaurant with another woman approximately an hour and one-half earlier (Tr. 219), and had followed McIntyre down to the restroom. (Tr. 156, 172, 214). There was evidence that the brunette who met with McIntyre in the restroom was a former roommate of McIntyre's and a fellow stewardess with McIntyre at Eastern Airlines. (Tr. 278-79).

versation, which was overheard by an employee of the restaurant, the brunette told McIntyre, "That's the best I can do for you," or "that's the best advice I can give you." (Tr. 409-410). After the meeting with the brunette, McIntyre mounted the stairs to the dining area, swearing as she went. (Tr. 410). Upon her return to the table she handed her purse to Weindling. (Tr. 62, 224). Weindling opened the purse and passed it to Minichiello. (Tr. 62, 224, 233, 239). Minichiello examined three separate plastic bags in an envelope within the purse, each containing varying quantities of white rocks and white powder. (Tr. 63-65, 102).^{*} After examining the contraband, Detective Minichiello returned the purse to Weindling and advised him that he would go to his car to get the money. (Tr. 65, 101). Weindling told Detective Minichiello to take the purse with him. (Tr. 65, 103, 104, 148). Minichiello, knowing that the Task Force's plan had been for the defendants to be arrested with the cocaine in their possession, (Tr. 99), and flustered both at the change of plans and the idea of carrying a woman's purse (Tr. 105), however, refused to take the purse, remarking that he would look ridiculous carrying a woman's purse. (Tr. 65-66).^{**} Immediately after Detective Minichiello left the table to go to his car, McIntyre took her purse and went downstairs, (Tr. 157, 216, 226-27), where the brunette had remained following their earlier conversa-

^{*} Weindling had described these three bags of cocaine to Detective Minichiello in some detail earlier. (Tr. 59).

^{**} The dining room area of Grass Restaurant is broken by a series of large pillars which are covered with mirrors. These pillars hid the surveillance agents of the Task Force from Detective Minichiello, but at the same time permitted the surveillance agents to watch the activity at the defendants' table through the reflections in the mirrors. (Tr. 153-54, 212, 234). Thus, Detective Minichiello was unaware that members of the surveillance team were in the restaurant when Weindling handed him the purse containing the three and one-half ounces of cocaine. (Tr. 115-116, 124).

tion in the restroom. (Tr. 156, 216). When Minichiello reached his car he gave the signal for the defendants to be arrested, (Tr. 66, 191), and Task Force members who were in the restaurant and who saw the signal (Tr. 235), arrested Weindling at the table and McIntyre downstairs as she had just begun to place a telephone call.* (Tr. 217, 157-58). McIntyre's purse was seized after her arrest and searched, but it contained no cocaine. (Tr. 195, 203, 218, 240).

Following their arrest the defendants were advised of their rights and transported to a police station to permit a female officer to search McIntyre. (Tr. 289-292, 294, 305). During the car ride to the police station Weindling told McIntyre in an agitated way that they were in trouble. McIntyre, however, told him not to worry. (Tr. 293). Weindling then said "they have the pocketbook," to which McIntyre responded, "there is nothing in the pocketbook, don't worry, relax, relax." (Tr. 294, 517-18).

At the police station the officers transporting the defendants received a telephone call informing them that the three and one-half ounces of cocaine had not been seized.** (Tr. 294, 354). When one of the officers asked Weindling where the cocaine was, he replied that he had left it on the table. (Tr. 294-95). Approximately forty-five minutes following the arrests, officers of the Task Force returned to Grass Restaurant. They did not find the three and one-half ounces of cocaine at the table,

* An arrest of Detective Minichiello and the informant was also simulated. (Tr. 106).

** Upon returning to headquarters the Task Force agents learned from Detective Minichiello that he had not seized the three and one-half ounces of cocaine. After opening defendant Weindling's briefcase, which Weindling had carried to Grass Restaurant and which had been seized at the time of his arrest, and failing to find the three and one-half ounces of cocaine inside, the agents returned to Grass Restaurant to conduct a search. (Tr. 354-55, 197, 204, 219, 240).

which had already been reset, or anywhere else in the restaurant. (Tr. 197-98, 219, 358).

During an interview following his arrest, Weindling admitted giving Detective Minichiello two samples of cocaine on April 27th and April 28th and having three and one-half ounces of cocaine in Grass Restaurant on April 27th. He said he had purchased that cocaine from a Cuban named Jose for \$2,800.00 (Tr. 340-41). A search of the briefcase which he had carried to Grass Restaurant revealed drug paraphernalia with traces of cocaine. (Tr. 323, 329, 388-89).

The Defendants' Case

Defendant Weindling presented no evidence on his own behalf and immediately rested.

Defendant McIntyre then testified in her own behalf. She admitted meeting at Sixish and Grass Restaurants with Weindling, the informant and Detective Minichiello on both April 27 and 28, 1977. (Tr. 459, 464-65, 488, 490). She denied, however, that Weindling had given a sample of cocaine to Detective Minichiello in her presence, that three and one-half ounces of cocaine had been in her purse, or indeed, that there had been any discussion of cocaine on either day. (Tr. 476, 477, 479, 587). McIntyre admitted going to the restroom, and conceded that she may have had a brief conversation with someone while there. (Tr. 469-70, 483). Although she also admitted that Weindling took her purse upon her return to the table, and that she returned downstairs almost immediately after Detective Minichiello left the table, she explained these developments by stating that Weindling took her purse in order to get money to pay the bill and that she returned downstairs to call a cat hospital. (Tr. 471, 475, 501-502).

In the course of direct and cross-examination McIntyre told the jury that she had begun to live with Weindling approximately three weeks after moving to New York and meeting him. (Tr. 456, 516). In support of Weindling's defense that he was a cocaine addict, (Tr. 30, 356, 367), McIntyre testified that two months after they began living together she became aware that he used cocaine and, in fact, that he used it daily, "anytime he felt like it." (Tr. 457, 479, 481, 525-27).

McIntyre described herself as a person from a family of eleven, living in a small town of Irwin, Pennsylvania, and maintained that she never swore nor drank. (Tr. 454, 465, 467, 474).

In contrast to the small-town pristine girl image McIntyre tried to convey on direct examination, under cross-examination McIntyre revealed that prior to becoming an Eastern Airlines stewardess she had been a "professional dancer" at the Castaways Resort at Miami Beach and a Playboy bunny at the Great Gorge Playboy Club in New Jersey. (Tr. 514, 515-16). Her attempts to mislead the jury on direct examination were not confined to her description of herself, but also included a description of Patricia Thomas, her prior roommate. During the Government's case, a Task Force officer had identified Patricia Thomas as the person he was eighty-five percent sure was the brunette at Grass Restaurant. (Tr. 283). The Task Force officer had testified that the brunette had a tan, and when cross-examined as to Patricia Thomas' race, stated that she appeared to be white. (Tr. 282). On her direct examination, defendant McIntyre stated Patricia Thomas was black. (Tr. 456). During cross-examination, however, she identified a picture of Patricia Thomas, a picture of a woman who plainly appeared to be caucasian. (Tr. 578-79).

The Government's Rebuttal Case

The Government called one witness* to rebut McIntyre's testimony that when she was given the money which Weindling had at the time of his arrest it amounted to approximately \$200.00. (Tr. 520, 575-76, 584-86). Agent Sandler of the Task Force testified that he gave McIntyre \$892.50 that Weindling had been carrying when arrested. (Tr. 601-602).**

A R G U M E N T

POINT I

Evidence of Detective Minichiello's Prior Service Record Properly Was Received In Evidence.

Defendants claim that Judge Owen committed reversible error in permitting on redirect examination of Detective Minichiello inquiry into his meritorious service record with the Police Department. Weindling and McIntyre argue further that this alleged error was compounded by the prosecutor's summation reference to Minichiello. In the face of defense counsel's clear attack on Minichiello at trial, with the suggestion that he had bungled the investigation and was committing perjury to advance his career, these claims simply are without merit.

* The Government also attempted to offer the testimony of a New York City Police Officer regarding his seizure of a triple beam scale from a table in defendant Weindling's apartment. (Tr. 607-608). Judge Owen chose, however, to exclude the testimony. (Tr. 610, 623).

** The \$892.50 seized from Weindling at the time of his arrest was very likely the remaining portion of the approximately \$1,000.00 which Weindling charged his other customer for the one ounce of cocaine he could no longer sell Detective Minichiello. The difference in cash could be explained by the fact that Weindling paid for the lunch at Grass Restaurant (Tr. 119), and paid \$50.00 for people to carry the three and one-half ounces of cocaine to Grass Restaurant. (Tr. 57).

From defendant's opening and throughout the cross-examination of Detective Minichiello, Weindling and McIntyre sought to capitalize greatly on the fact that the police officer had not been able to obtain the actual three and one-half ounces of cocaine shown to him in the Grass Restaurant. Toward this effort, defendants directly suggested that Minichiello was fabricating his version of the events, out of a concern for his poor investigative work and to further his career. Thus, Weindling cross-examined Detective Minichiello about his grade level, his failure to receive any recent promotions (Tr. 73-74), and his failure to use any electronic recording equipment (Tr. 81, 97), or to procure a search warrant in this case. (Tr. 93-94). In addition, ridicule of Detective Minichiello punctuated the cross-examination (Tr. 73-74, 86-87, 102-105), including a question posed after reviewing the fact that Detective Minichiello did not take the three and one-half ounces of cocaine when it was offered. At this point Weindling's attorney asked, "Did you ever hear of Maxwell Smart?" (Tr. 105).^{*} The implication of all of the cross-examination was that Detective Minichiello's testimony was too far-fetched to be believed and could only be the result of perjury.^{**} Indeed, as the defense attorney pointed out at the end of the cross-examination in an argumentative question, "we only have your word for it that [the three and one-half ounces of cocaine] ever existed?" (Tr. 108).^{***}

^{*} Maxwell Smart was the major character in a television series that revolved around a bumbling undercover agent.

^{**} Although McIntyre's cross-examination of Minichiello was less biting in tone and sarcasm than Weindling's, her counsel also suggested that Minichiello had bungled the investigation and fabricated additional events. (*See, e.g.* Tr. 118-19, 122-23).

^{***} Defense counsel's statement was accurate only at that point in the trial; for, by the end of the Government's case the jury had heard from Detective Rinaldi of defendant Weindling's concern following his arrest for McIntyre's purse and Weindling's admission that he left the cocaine on the table at Grass Restaurant, and from Agent Sandler of Weindling's admissions regarding the source and price of the three and one-half ounces of cocaine. (Tr. 294-95, 340-41).

In the circumstances of this direct attack on Minichiello's credibility, with the suggestion that he was lying to advance his career, it was perfectly proper for the Government on redirect examination to elicit Minichiello's excellent service record and prior commendations. As Judge Owen observed in permitting this redirect examination after referring to defendants' cross:

"[the prosecutor] is trying to counter that suggestion by showing that he already had a good reputation and obviously, to the contrary, he had a desire to maintain it rather than destroy it by a false accusation." (Tr. 131-32).

See *United States v. Scholle*, 553 F.2d 1109, 1123 (8th Cir. 1977), *cert. denied*, — U.S. — (1977); *United States v. Tramunti*, 513 F.2d 1087, 1118 n.33 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); Fed. R. Evid. Rule 608(b). The Government bolstered the witness' credibility by demonstrating that the witness had an excellent reputation among his peers and would not jeopardize his position by being untruthful. This rehabilitation went directly to the attack on the witness' truthfulness and therefore was not error.*

Defendants' further challenge to the Government's summation argument concerning Detective Minichiello's credibility is equally baseless. (Tr. 664-66; App. 44-46). The prosecutor's contention that the jury could find Minichiello to have been a credible witness who had no motive to lie was amply justified by the record and fairly anticipated the vicious assault on Minichiello undertaken

* The precedents cited by Weindling support the Government's position. *United States v. Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), stands for the proposition that redirect examination which may otherwise be improper is permissible after appellant opened the door during cross-examination. In *United States v. Tramunti*, 513 F.2d 1087, 1118 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), the Court held defense counsel had opened the door to testimony that a defendant had been imprisoned by ridiculing the witness during cross-examination.

by both defense counsel. (See, e.g., Tr. 683-86, 699-700, 707, 718-22, 731). The prosecutor's argument was both fair and proper. See *Lawn v. United States*, 355 U.S. 339, 359-60 n.15 (1958); *United States v. Stassi*, 544 F.2d 579, 585 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. Estremera*, 531 F.2d 1103, 1110 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976); *United States v. Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States v. Brawer*, 482 F.2d 117, 113-34 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States v. LaSorsa*, 480 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).*

POINT II

The Government Properly Elicited Testimony Concerning The Identity Of The Brunette.

In the course of her luncheon meeting with Detective Minichiello at the Grass Restaurant, McIntyre was observed to retire to the washroom where she met with a brunette who also had been seated at a table near defendants. (Tr. 156, 172, 214, 216, 219, 406-410). On cross-examination of Detective DeRosa, one of the surveillance officers present at the restaurant, the witness was asked if he "knew" the identity of the brunette, to which he replied "No." Thereafter, on redirect examination the Government established that DeRosa recently had undertaken an investigation to learn the identity of the brunette and that after recently interviewing a woman

* Indeed, if excess existed at all, it was in the defense argument that "after Watergate," it was no longer inconceivable that Government agents could lie and do underhanded things. (Tr. 718). As the Court recognized in *United States v. DeAlessandro*, 361 F.2d 946 (2d Cir. 1966), which is cited by Weindling, an argument in summation that the jury would have to find the Government witnesses to be perjurers if the jury were to accept the defense version of events, is neither extremely inflammatory nor prejudicial. *Id.* at 696-97.

named Patrica Thomas, a former roommate and co-worker of McIntyre's, the detective was "85% sure" that Thomas was the brunette he saw at the restaurant with McIntyre. (Tr. 228-29; 278-283).*

On appeal, while apparently conceding that this evidence was relevant,** defendants argue that it was too speculative and should have been excluded. They assert additionally that the prosecutor's summation reference to DeRosa's testimony compounded the prejudice and requires reversal. Defendants' contentions do not withstand even swift analysis.

Quite apart from the fact that defendants' cross-examination of DeRosa specifically invited the clarifying testimony on redirect concerning the brunette's identity, *United States v. Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), DeRosa's testimony would have been admissible as part of the Government's case-in-chief. The sum and substance of DeRosa's testimony was that, having observed the brunette during the narcotics transaction, he subsequently saw a woman whom he was able to identify as the same brunette, namely, Patricia Thomas. Such identification testimony clearly was not hearsay and was admissible. Fed. R. of Evid.

* On the first morning of trial the Government informed defense counsel by hand-delivered letter that Patricia Thomas had been identified as a co-conspirator. (Tr. 23).

** As defendants implicitly recognize, evidence of the identity of the brunette was particularly relevant in light of the testimony of a waitress at Grass Restaurant that McIntyre and the brunette were speaking in "low tones, very confidentially" for approximately four minutes in the women's restroom during McIntyre's first trip downstairs (Tr. 408, 406-10), and the testimony of two Task Force Officers that the brunette was still downstairs when McIntyre made her second trip downstairs. (Tr. 156, 216). On that second trip downstairs, the jury reasonably could infer that McIntyre disposed of the three and one-half ounces of cocaine which had just been shown to Detective Minichiello, but which could not be found following a search of the restaurant.

Rule 801(d)(1)(C); *United States v. Lewis*, 565 F.2d 1248 (2d Cir. 1977); *United States v. Marchand*, 564 F.2d 983 (2d Cir. 1977); cf. *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976).

Defendants' present attack that DeRosa's testimony was speculative does not go to its admissibility but to the weight of such testimony. *United States v. Marchand*, *supra*, 564 F.2d at 996.* In this respect, defendants in no

* The cases relied upon by defendant allegedly to the contrary are easily distinguishable. In *United States v. Borelli*, 336 F.2d 376, 392 (2d Cir. 1964), the Court criticized as improper, speculation by a witness that "units" he had seen were narcotics, since it was unclear if the witness was relying on his own sense impressions, hearsay, or speculation from the price to be paid for the units. Detective DeRosa's testimony was based on personal observation of both the brunette in the restaurant and Patricia Thomas. (Tr. 279-283). Again, in *Robertson v. United States*, 171 F.2d 345, 346 (D.C. Cir. 1948) (Per Curiam), the Court criticized as incompetent testimony as to what a witness thought the defendant and others were saying to each other. In *United States v. Gallo*, 123 F.2d 229 (2d Cir. 1941), the Court upheld the restriction on cross-examination which prevented appellant from inquiring of a witness his opinion as to the role played by appellant. Detective DeRosa's testimony required no such opinion, it was merely identification testimony, subject to full cross-examination so that the jury could evaluate its weight. Finally, appellant McIntyre cites *United States v. Provoo*, 215 F.2d 531, 534-35 (2d Cir. 1954), for the proposition that the door had not been opened to further inquiry into DeRosa's knowledge of the identity of the brunette since his statements in response to defense questioning had not given rise to an adverse inference because of the fragmentary character of the evidence. To the contrary, the jury learned through the cross-examination of DeRosa that he had followed the movements of the brunette and connected them to the defendant McIntyre, yet he had not arrested the brunette nor written of her in a report. When the defendant asked whether he now knew who the brunette was, the jury was entitled to know that DeRosa had treated the identity of the brunette seriously enough to conduct an investigation and that he was in fact 85% sure of the identity of the brunette.

way were restricted from attempting to impeach DeRosa by pointing to the circumstances of his observation of the brunette or alleged inconsistencies between his description and Thomas' actual appearance, matters which they undertook briefly at trial. (Tr. 229-33, 297-82). Indeed, defendants sought to impeach DeRosa's testimony by presenting evidence that he was mistaken as to her race. (Tr. 282, 466, 578-79). Of course, Thomas was as equally available to the defense as a witness as she was to the Government.

Finally, defendants' suggestion is totally unfounded that the prosecutor somehow misused in summation the evidence of the brunette's identity. The Government did no more than argue that DeRosa's testimony—taken together with Weindling's statements in the course of the conspiracy—supported the finding that the brunette with whom McIntyre met in the restaurant was in fact Patricia Thomas, by McIntyre's own admission, her close acquaintance. The Government further contended that from all the evidence the jury could infer that McIntyre had turned over the cocaine to Thomas immediately prior to the former's arrest, thereby explaining the absence at trial of the three and one-half ounces of cocaine. (Tr. 659, 742-47; App. 39, 56-61). This argument merely asked the jury to draw an available and clear inference from the evidence before them, and, given defendants' lengthy attempt in summation to attack the whereabouts of the missing cocaine (Tr. 691-95, 702-09, 723, 732-34), was an absolutely proper—if not virtually compelled—response.

POINT III

The District Court Properly Excluded Post-Arrest Statements By Weindling Exculpating McIntyre.

Following his arrest defendant Weindling pleaded with the Task Force agents to let co-defendant McIntyre go, asserting that she was innocent of the drug transaction. At the same time he also made numerous statements directly admitting his own guilt.* Prior to trial the question of admissibility of the statements exculpating McIntyre was considered by the trial court. Defendant McIntyre urged that the statements were admissible under Rule 804(b)(3) of the Federal Rules of Evidence.** The Government opposed the admission of the exculpatory statements on this ground. Judge Owen ruled that the question was raised prematurely since it was not clear that Weindling in fact would be unavailable, as required by the Rule.*** The District Court also opined, however, that the statement exculpating McIntyre was not against Weindling's interest, (Tr. 19-23), but deferred a final ruling on the issue until it was ripe for decision. Thereafter, although Weindling in fact rested

* See pp. 6-7, *supra*. Weindling's post-arrest admissions of his own criminality were admitted, of course, not under Rule 804(b)(3), but as non-hearsay statements under Rule 801(d)(2)(A).

** Rule 804(b)(3) reads in pertinent part as follows:

"(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness; . . .

(3) Statement against interest. . . A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

*** Immediately prior to this ruling, Weindling's attorney stated he was undecided whether or not his client would testify. (Tr. 5-6). It was not until the Government rested that defendant Weindling voiced his decision not to testify. (Tr. 448-50).

his case without testifying and before McIntyre's defense commenced, McIntyre did not seek to introduce the exculpatory statement pursuant to Rule 804(b)(3) nor did she press the trial judge further for a ruling.

On appeal, McIntyre claims that the exculpatory statement should have been admitted and that Judge Owen committed error (i) in finding that the statement exculpating McIntyre was not against Weindling's penal interest, and, (ii) in not proceeding to analyze whether sufficient corroboration for the statement existed. These contentions must be rejected.

First, although the point is totally ignored by appellate counsel in McIntyre's brief, defendant utterly failed to preserve her present claim for review by offering the statement and seeking a final ruling from the trial judge, as defendant specifically was invited to do by Judge Owen. *United States v. Nathan*, 536 F.2d 988 (2d Cir. 1976), cert. denied, 429 U.S. 930 (1976). See generally, *United States v. King*, 560 F.2d 122 (2d Cir. 1977), cert. denied, — U.S. — (19); *United States v. Braunig*, 553 F.2d 777 (2d Cir.), cert. denied, 431 U.S. 959 (1977). Indeed, at the only point in time when the question was presented to the District Court, it was clear that the "declarant"—Weindling—was not yet unavailable and therefore that there was no foundation for admitting the statement pursuant to Rule 804(b)(3). *United States v. Oropeza*, 564 F.2d 316 (9th Cir. 1977).

Second, while we submit it is clear that this Court should not reach the merits of McIntyre's present claim, her contentions are in any event incorrect.

As Judge Owen observed, Weindling's statement to Task Force Agents that his girlfriend was innocent hardly was against *his* penal interest, since the exculpating remarks were "in the collective interest." (Tr. 22). Weindling not only wanted to save his girlfriend, but also wanted to prevent the seizure of the

three and one-half ounces of cocaine, which, then unknown to the agents, at the very moment that Weindling was asserting McIntyre's innocence remained unrecovered. Furthermore, the nature of the crime—that it was committed by a group of conspirators rather than only one person—meant that Weindling's statement of his own guilt did not by itself exculpate McIntyre, and a statement of her innocence was entirely suspect. See *United States v. Oropeza*, *supra*, 564 F.2d at 325 (9th Cir. 1977); *United States v. Pena*, 527 F.2d 1356, 1361-62 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976); Weinstein & Berger, 4 *Weinstein's Evidence* ¶ 804(b)(3) [02] 804-88. As a result, the instant case readily is distinguishable from those in which the defendant sought to offer a declarant's confession to a one-person crime, a confession which necessarily exculpated the defendant. *Chambers v. Mississippi*, 410 U.S. 284, 297, 301 (1973).

In support of her position that the exculpatory statement was against Weindling's penal interest, McIntyre, citing *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976),* argues that the judgment of what is against

* Defendant also relies on *United States v. White*, 553 F.2d 310 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977). In *White*, however, this Court, without deciding the point, noted the authority for serving statements which both incriminated the declarant and exculpated the defendant, when offered for the exculpatory purpose. The *White* Court cited for this proposition *United States v. Marquez*, 462 F.2d 893 (2d Cir. 1972), and *United States v. Seyfried*, 435 F.2d 696 (7th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971), two cases antedating the Federal Rules of Evidence and which excluded exculpatory statements. In each case the post-arrest statements assuming the guilt for oneself and exculpating comrades were held to lack the inherent reliability which would justify admission of the exculpatory portion of the statement. *United States v. Marquez*, *supra* at 895 ("Cocaine mine, other guys had nothing to do with it."). *United States v. Seyfried*, *supra*, at 697 ("No other person had knowledge of or participated with me in the above described robbery.').

[Footnote continued on following page]

one's penal interest must be a broad one. In *Barrett*, the First Circuit held that a statement by a co-conspirator to a fellow cardplayer exculpating the defendant was against the co-conspirator's penal interest⁴ for the purposes of Rule 804(b)(2). *Id.* at 251.*

In reaching its decision as to whether a portion of the statement exculpating the defendant was against the declarant's penal interest, the First Circuit in *Barrett* used a two-pronged analysis. First, the statement was dis-serving to the declarant "since it strengthened the impression that he had an insider's knowledge of the crimes." *Id.* at 252. Second, the exculpatory portion of the statement was sufficiently integral to the entire statement. Even assuming *arguendo* that the *Barrett* analysis is correct—a matter we do not concede—McIntyre does not satisfy the test enunciated therein. While Weindling's statement exculpating McIntyre revealed an insider's knowledge of the crime, it was totally collateral to his admissions regarding his own criminal conduct. Thus, Judge Owen correctly addressed himself directly to the severability of Weindling's post-arrest statements and found that, the "one [incriminating himself] is against

[Continued from previous page]

Defendant also cites *United States v. Goodlow*, 500 F.2d 954 (8th Cir. 1974), in which the Court held that the statement to three different people on three different occasions that the declarant was "'good for the crime'" and the defendant was not "'good for it,'" had sufficient indicia of trustworthiness to be admissible. *Id.* at 956, 958. The *Goodlow* Court stated, applying Rule 804(b)(3) which was not yet in effect, that the admission of the two statements should be considered together since they were made within the same general context. *Id.* at 956.

* In *Barrett*, the co-conspirator had identified the people, including one "Buzzy" and himself, who were going to have trouble because of the crime they had committed together. A fellow card-player asked if the co-conspirator meant "Bucky", who was the defendant, or "Buzzy", and the reply was, "No, Bucky . . . wasn't involved. It was Buzzy." *United States v. Barrett*, *supra* at 249.

interest and [the] one [exculpating McIntyre] is in the collective interest." (Tr. 22).

Finally, even if this Court overlooks McIntyre's waiver of the point and concludes that the statement exculpating McIntyre was against Weindling's penal interest, Judge Owen's tentative findings and the record itself clearly establish that the corroborating circumstances required by Rule 804(b)(3) were absent and that the statement properly would have been excluded as well on this ground.* In *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), *cert. denied*, — U.S. — (19), this Court outlined the four factors which constitute the necessary indicia of trustworthiness required by Rule 804(b)(3) for admission of an exculpatory statement:

"(1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; and (4) the availability of the declarant as a witness." *Id.* at 754.

* Defendant McIntyre requests that the conviction be reversed in order to permit the District Court to make specific findings as to whether there was sufficient corroboration of the statement's trustworthiness. A remand is unnecessary since Judge Owen's findings below and the record itself provide a sufficient basis for the Court to weigh the trustworthiness of Weindling's declaration.

United States v. Barrett, 539 F.2d 244 (1st Cir. 1976), cited by appellant, does not indicate a remand would be appropriate in the instant case. In *Barrett*, the Court refrained from conducting the analysis of the trustworthiness of the statement itself since it was, for other reasons, vacating the conviction and ordering a new trial. *Id.* at 253. Moreover, McIntyre's suggestion for a remand on this issue particularly is startling since she chose to leave the record in its present state by not offering the statement at an appropriate time for a final ruling.

See also, *United States v. Oropeza*, *supra* (post-arrest statement of co-conspirator exculpating defendant excluded after analysis of four factors in *Barrett*). Here Weindling made his statement after his arrest and to law enforcement officers, two factors which alone militate against admission. See *United States v. Bagley*, 537 F.2d 162, 167 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). Cf. *United States v. White*, *supra*, 553 F.2d at 313 n.4. In addition, as earlier noted, the statement was made at a time when the three and one-half ounces of cocaine remained near at hand and unrecovered by the Task Force Agents, and therefore Weindling had great interest in throwing the agents off-guard from looking for the cocaine and freeing McIntyre to complete its disposal. In the last analysis, the strongest indication against the reliability of the statement was McIntyre's own statement that they had nothing to worry about with respect to her pocketbook.*

* Although McIntyre's brief lists a number of facts purportedly corroborating Weindling's assertion of her innocence, none of those facts is persuasive. In listing circumstances allegedly corroborating McIntyre's innocence, defendant misconstrues the record and mentions facts totally consistent with the Government's theory of the case. Contrary to the assertion that "[t]here was absolutely no evidence that McIntyre saw or had any knowledge of either of the two alleged cocaine transfers that occurred on April 28th" (McI Br. at 34), there was a wealth of evidence demonstrating her knowledge and involvement. McIntyre touted the quality of the three and a half ounces of cocaine as Weindling passed the sample by showing Detective Minichiello where it had hurt her nose. (Tr. 56-57). She brought the three and one-half ounces of cocaine to Weindling in her purse. (Tr. 62-65). Weindling passed that purse to Detective Minichiello in such a way that Detective DeRosa, who was on McIntyre's side of the table, was able to see it from across the room. (Tr. 224). The facts that McIntyre went downstairs for a second time, that she was found by arresting officers at a phone booth as she was just beginning to make a telephone call, that the cocaine was not found in her purse then or at the restaurant during a search

[Footnote continued on following page]

POINT IV

The Cross-Examination Of Defendant McIntyre Was In All Respects Proper.

On appeal defendant McIntyre, and in one instance defendant Weindling, take issue with certain rulings of the District Court concerning the scope of cross-examination permitted during McIntyre's testimony. Contrary to defendants' present claims, each of these rulings was correct in the circumstances of McIntyre's testimony and surely was within the trial judge's sound discretion to control the bounds of cross-examination. *United States v. Glasser*, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *see also*, *United States v. DeMarco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *United States v. Lewis*, 447 F.2d 134, 139 (2d Cir. 1971); *United States v. Evan-chik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States v. Dardi*, 330 F.2d 316, 333 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

A. The Playboy Bunny

McIntyre first asserts that the prosecutor should not have been permitted to elicit from her that she had been a Playboy Bunny one year prior to the crime charged in the indictment, and that this evidence was so highly prejudicial as to require a new trial. In light of the facts of this case, and McIntyre's testimony during direct examination, the trial judge correctly determined that it

[Continued from previous page]

conducted 45 minutes later all dovetailed with the evidence that Weindling and McIntyre had accomplices in the restaurant and that McIntyre was able either to return the cocaine to the accomplices or otherwise dispose of it prior to her arrest. Weindling's concern after his arrest for the whereabouts of her pocketbook and her reassurances that there was nothing in the pocketbook make that conclusion inescapable. (Tr. 294).

was relevant and fair to cross-examine McIntyre about her previous employment at the Great Gorge Playboy Resort.

The Government's witnesses established McIntyre's presence at and participation in negotiations on two consecutive days for the sale of cocaine. McIntyre, nevertheless, took the stand and denied that there had been any discussion of cocaine, or transfer or possession of the drug on either occasion. (Tr. 476, 479). To support her broad denials McIntyre plainly sought, both in demeanor and substance of her testimony, to create the impression, as Judge Owen succinctly noted, that she was a "dewy-eyed high school graduate from Irwin, Pennsylvania that comes to New York and falls into evil hands, who swears infrequently and never drinks." (Tr. 508). In view of defendant's attempted self-serving characterization of her good character and naive background, the District Judge properly ruled that the jury was entitled to hear defendant's complete background in order to assess her credibility.

McIntyre now attacks this ruling on two purported grounds. First, she claims that the trial judge erroneously found an attempt by defendant to create the "dewy-eyed" school girl impression. This claim disregards the trial judge's ability to assess the demeanor and appearance of the witness during her testimony, a matter traditionally and sensibly reserved to the trial court's first-hand observations. See, e.g., *United States v. DeLeon*, 561 F.2d 421, 423 (2d Cir. 1977). Cf. *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Moreover, the substance of McIntyre's direct testimony clearly was designed to create the impression described by Judge Owen. Thus, McIntyre testified that she was twenty-two, had been brought up in a small town in Irwan, Pennsylvania, was one "of a family of eleven if you don't count cousins"

(Tr. 454), did not drink alcohol—a matter she repeatedly emphasized with her references to “Tab”—(Tr. 646, 465, 467), did not generally swear, and never had been arrested. (Tr. 474, 487). Moreover, defendant claimed that her principal involvement in the conversations during her restaurant meetings with Minichiello and Weindling was an expression of her concern for the health of their “cat” who was “hospitalized” at that time. (Tr. 474). The thrust of this testimony, together with McIntyre’s clear attempt to display a sincerity to be candid which was inconsistent with her involvement in the crime (see, e.g., Tr. 484, 501), surely created a disarming picture for the jury of “sweetness” and lack of worldliness which justified the limited inquiry into McIntyre’s employment background.

Second, McIntyre appears to argue that even if this evidence was relevant, the prejudicial effect outweighed its probative value, and therefore the evidence should have been excluded under Fed. R. of Evid. Rule 403. This contention is somewhat remarkable since McIntyre’s prior employment was not illegal, nor did the Government seek in any way to suggest that her work as a Playboy Bunny painted McIntyre as a person of ill-repute. The references to her work as a Playboy Bunny were confined to the point at which McIntyre reluctantly mentioned her job at Great Gorge Resort as one episode in her work history (Tr. 513-14), and one question. (Tr. 516). To the extent that the prosecutor made any reference in summation to this work history it was limited to the simple and proper argument that defendant was not the “dewey-eyed” school girl misleadingly suggested by her direct testimony. (Tr. 739-42). In all these circumstances, the District Court’s ruling permitting the inquiry hardly amounted to an abuse of discretion. *United*

States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (*en banc*).*

B. The Number 357

McIntyre next asserts as error a question during cross-examination in which she was asked if defendant Weindling had said during the course of drug negotiations that she carried the gun in the family. (Tr. 489). McIntyre claims that this was error because there was no factual basis in the record for the question and Weindling's statement was not a conspiratorial admission. These claims are frivolous.

First, in the District Court McIntyre did not object to this line of questioning and cannot be heard to complain for the first time on appeal. *United States v. Ruffin*, Dkt. No. 77-1160, slip op. 6565 (2d Cir., Feb. 27, 1978); *United States v. Fuentes*, 563 F.2d 527 (2d Cir. 1977).**

* Defendant's suggestion of the prejudicial impact of this evidence surely is exaggerated. McIntyre on redirect, specifically testified to the strict control and supervision under which Playboy Bunnys work. (Tr. 581-82). Moreover, contradiction of McIntyre's "sweet Sue" image did not interject any new matter into the record. There already had been testimony from Detective Mini-chiello and a waitress at Grass Restaurant that McIntyre used vulgar language on two occasions. The former occurred when McIntyre described the potency of the cocaine she had used the night before (Tr. 56-57), and the latter when McIntyre left the brunette after a conversation in hushed tones in the bathroom. (Tr. 410).

** McIntyre's attorney did not object at any point to cross-examination regarding the number 357. Weindling's attorney entered one objection, and that was prior to the point at which the "gun in the family" phrase was mentioned. (Tr. 489). Even if McIntyre could benefit from Weindling's objection, the objection was only to a prefatory question, not the entire line, and therefore did not preserve the point. *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Even in reaching the merits of the contention, however, McIntyre's claim must be rejected. McIntyre admitted during cross-examination that at defendant Weindling's request she had chosen the number "357" as the number on which a bet was to be placed with Detective Minichiello. (Tr. 488). Minichiello had testified earlier that that bet was part of the price of the cocaine. (Tr. 48-49). McIntyre insisted, however, that she chose three random numbers, 3, 5, and 7, instead of the number "357". (Tr. 488). At that point the Government inquired whether she and the defendant Weindling had not laughed at her choice of a number. When McIntyre inquired of the prosecutor what the joke was, the Government continued its examination by asking if she remembered defendant Weindling explaining to Detective Minichiello and the informant that she "carried the gun in the family." After initially claiming ignorance of how the number 357 was related to Weindling's joke about a gun, McIntyre admitted that she had heard of a .357 magnum since her brother was a state policeman. (Tr. 489).

The questioning regarding McIntyre's choice of the number 357 plainly was relevant since it involved her direct role in negotiating for the price of the three and one-half ounces of cocaine and further was a direct test of her credibility, given her direct testimony which contradicted Minichiello on this point. As long as a good faith basis existed for the question, and defense counsel never suggested that a good faith basis was absent, the question was proper, regardless of the fact that the jury had not yet heard of that portion of the negotiations. Furthermore, it stretches credulity to suggest, as defendants do for the first time on appeal, that a statement by Weindling in the midst of price negotiations for cocaine—a statement in which he comments, even in jest, about the personal qualities of the co-conspirator who is participating in the immediate negotiations and the sale—was not a

statement made during the course of and in furtherance of the conspiracy. Fed. R. of Evid. Rule 801(d)(2)(E).*

C. The Triple Beam Scale

During cross-examination, defendant McIntyre was asked if she had seen a triple-beam scale, which was marked for identification and shown to her, in defendant Weindling's apartment.** McIntyre denied having seen that scale, but admitted seeing a postage scale in the kitchen of the apartment she shared with defendant Weindling. (Tr. 550-53). On appeal, defendant Weindling claims as error, for the first time, the prosecutor's reference to the scale in the question to McIntyre and the District Court's failure to charge the jury, contemporaneously to McIntyre's negative answer, that the question itself was not evidence.

In the District Court Weindling did not object to the specific questions now claimed to have prejudiced him so greatly, nor did he request any kind of contemporaneous "curative" instruction. While Weindling did move for a mistrial upon the prosecutor's inquiry whether McIntyre knew what a triple-beam scale was used for, he did not voice objection to either the preceding or subsequent questions which attempted to elicit whether McIntyre had

* Indeed, the Court in *United States v. Santos*, 385 F.2d 43, 45 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968), upon which McIntyre relies, held that statements made by co-conspirators, outside the presence of the defendant, which indicated defendant's role in the conspiracy, were statements made in the course of and in furtherance of the conspiracy.

** The scale in question had been seized by a New York City Police Officer from a table in Weindling's apartment, along with a quantity of marijuana, approximately three weeks after defendants Weindling and McIntyre met and immediately prior to the time at which they began living together. (Tr. 516, 548-50, 607-16, 623). The scale was later offered in evidence by the Government but excluded by the District Court.

seen the particular scale in Weindling's apartment. (Tr. 551-53). Weindling's single mistrial motion, therefore, was not sufficient to preserve the present point for appeal, *United States v. Badalamente, supra*, and he is precluded from claiming error based on the prosecutor's inquiry or the trial court's failure to give an immediate instruction. *United States v. Fuentes, supra*; *United States v. Braunig*, 553 F.2d 777 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977).

In any event, the suggestion of prejudice is totally unwarranted. The jury never learned the potential use of such scales and Judge Owen instructed the jury on at least two occasions—both at the beginning of the trial (Tr. 19) and in his final charge (Tr. 772)—that an attorney's questions are not evidence.* In view of this instruction and McIntyre's denial that such a scale had been in Weindling's apartment, any possible prejudice to Weindling was eliminated.

D. Airlines Passes and \$900

McIntyre challenges as error, pursuant to Fed. R. Evid. Rule 608(b), the admission of what she terms was "extrinsic" evidence of "collateral" matters relating to her close relationship with co-defendant Weindling and the amount of money she received for Weindling from police officers following defendants' arrest. She makes this claim with respect to two documents, introduced during her cross-examination, and with respect to the testimony of Agent Sandler of the Task Force who was called to rebut one portion of McIntyre's testimony. The two documents, each signed by defendant McIntyre, indicated that on prior occasions McIntyre, as an airline employee, had obtained free passes for Weindling in

* In fact, McIntyre's attorney echoed this thought when he stated before the jury, just prior to summations, that the scale itself was not in evidence. (Tr. 635).

connection with joint trips they took, by claiming that he was her husband, and as a result, that she lost her prior job at Eastern Airlines over these events. (Tr. 567; GX 12-13). The testimony of Agent Sandler, to which defendant now objects for the first time, concerned his return to McIntyre of approximately \$900 seized from defendant Weindling. (Tr. 601-602). This testimony contradicted McIntyre's statement that she had only received about \$200 (Tr. 520, 575-76, 584-86), and also provided evidence that defendant Weindling had, as he told Detective Minichiello, sold one ounce of cocaine to another customer between his two meetings with Detective Minichiello. *See supra*, at 9n.**

Defendant argues with respect to both of these areas that they constituted the introduction of extrinsic evidence on the issue of her character for truthfulness, and therefore should have been excluded under Rule 608(b). Defendant's reliance on Rule 608(b) is misplaced. As Judge Owen specifically noted, the two documents relating to the airline passes tended to prove McIntyre's bias and motive to help co-defendant Weindling, a proper area of impeachment since McIntyre's testimony, if believed by the jury, clearly would have exculpated Weindling. Bias is never a collateral matter and therefore may be proved by extrinsic evidence. *Weinstein & Berger, 3 Weinstein's Evidence*, ¶ 607[03], 607-17. *United States v. Brown*, 547 F.2d 438, 446 (8th Cir.), *cert. denied, sub nom., Hrdrix v. United States*, 430 U.S. 937 (1977). Moreover, quite apart from the fact that defendant never objected to Agent Sandler's testimony on any ground, and therefore cannot claim error in its admission, in both instances the now disputed evidence offered by the Government would have been admissible as directly probative of the crimes charged, regardless of whether defendant McIntyre testified. As Judge Owen found, the two airlines documents related not only to McIntyre's credibility, but also to her close relationship with co-defendant Weindling. (Tr. 557-58, 565-68). Similarly, Agent Sandler's testimony related directly to Weindling's cocaine trafficking, a subject

to which McIntyre pleaded complete ignorance. Cf. *United States v. Benedetto*, Dkt. No. 77-1306, slip op. 1735, 1742 (2d Cir., Feb. 24, 1978). And, where evidence is admissible on other grounds, the fact that it also impeaches the defendant is irrelevant. See, e.g., *United States v. Brown*, *supra*.

Finally, McIntyre's claim of prejudice is belied by the record. It cannot be doubted that the areas now complained of were proper ones at least for inquiry on cross-examination under Rule 608(b). McIntyre did not deny the prior instances of misconduct dealing with Weindling's airplane tickets but merely admitted haltingly to the conduct as she was confronted with the documentary evidence by the prosecutor. While the introduction of documentary proof made firm the point of the inquiry, in view of McIntyre's reluctant concessions this proof was no more than cumulative and could not have prejudiced her.

POINT V

The Evidence Was Sufficient That Defendants Possessed Three And One-Half Ounces Of Cocaine.

Weindling asserts that the proof was insufficient to support the jury's finding that the three and one-half ounces of white powder observed by Detective Minichiello in McIntyre's purse at the Grass Restaurant was cocaine. Defendant contends that his conviction on Count Four, which charged possession of that cocaine with intent to distribute, therefore should be reversed. This argument overlooks much of the relevant evidence and ignores the compelling inferences which the jury reasonably could draw from the testimony and exhibits, all of which, of course, must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Ruffin*, Dkt. No. 77-1160, slip op. 6565, 6576 (2d Cir., Feb. 27, 1978).

First, Weindling himself represented in the course of the direct negotiations that the three and one-half ounces of white powder he immediately displayed to Detective Minichiello in fact was cocaine, a representation which defendant later confirmed in his post-arrest admissions. (Tr. 56-57, 340). Minichiello described in detail the rocks and white powder he saw and felt through the plastic bags, a description consistent with the cocaine exhibits introduced in evidence for the jury's own examination. Moreover, the sample which Weindling handed to the agent and claimed was a part of the promised package, was introduced in evidence at trial and the testimony of a chemist established that the substance was cocaine. (GX 2; Tr. 387, 389). Weindling's own statements, Minichiello's description and the introduction of the sample clearly were sufficient, without more, to support the jury's conclusion that the missing white powder was cocaine. Fed. R. Evid. Rule 801(d)(2)(A); *United States v. Atkins*, 473 F.2d 308, 313 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Pennacchio v. United States*, 263 F. 66 (2d Cir.), *cert. denied*, 253 U.S. 497 (1920); *cf. United States v. Bermudez*, 526 F.2d 89, 97-98 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Cirillo*, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Second, if more was needed there was a wealth of circumstantial evidence to support the jury's verdict on Count Four. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977), *cert. denied*, — U.S. — (19) ; *United States v. Agueci*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied, sub nom., Giuppone v. United States*, 372 U.S. 959

* Although Weindling cites *Agueci* for the principle that circumstantial evidence can establish the narcotics nature of the contraband, he makes no effort to examine the plethora of evidence in this case—both direct and circumstantial—which supports the jury's finding of cocaine.

(1963);* cf. *United States v. Grant*, 545 F.2d 1309 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977). The tenor of the negotiations, including the high price demanded, \$3,400 (Tr. 49), the secrecy with which defendants shrouded their actions—deploying couriers to deliver the substance to the restaurant and concealing the substance itself—all supported the inference that the white powder seen in defendants' possession was cocaine. Finally, Weindling's anxiety following his arrest, as expressed to McIntyre, concerning the whereabouts of her purse, unmistakably pointed to the conclusion that the white powder was cocaine. (Tr. 294, 517-18).

POINT VI

The Government's Summation Was Proper.

Defendants complain that certain of the prosecutor's summation remarks deprived them of a fair trial. An analysis of the record makes plain that these claims are without merit.

Weindling first argues that two statements by the Government amounted to comments on his failure to testify and therefore violated his Fifth Amendment right not to be compelled as a witness. In the first statement, the Government, in reviewing the evidence which showed that the substance involved was cocaine, reminded the jury that it had "the defendant's own word for it" that the three and one-half ounces involved in the April 28th delivery were cocaine. (Tr. 665; App. 36). After an objection by defense counsel, the District Court promptly overruled the objection; that the Government merely was referring to the testimony of Detective Minichiello concerning Weindling's admissions, and the Government immediately proceeded to review Weindling's admissions as testified to by Detective Minichiello. (Tr. 656-57; App. 36-37). This reference to testimony was an entirely proper way for the Government to remind the jury of the

conspiratorial and post-arrest statements of the defendant which the jury had heard from Minichiello and other agents. In the context of the evidence and the entire summation, these brief remarks surely did not amount to a comment, direct or indirect, on the defendant's failure to take the stand.* *United States v. Bubar*, 567 F.2d 192, 200 (2d Cir.), *cert. denied*, — U.S. — (1977).**

The second statement occurred in the rebuttal summation in response to a defense summation accusation that the agents had stolen \$700 from Weindling. (Tr. 727). On rebuttal, the Government asked if there was any evidence of a complaint made by anyone about a theft. (Tr. 750; App. 64). To suggest that this argument constituted a comment on Weindling's failure to testify is entirely specious. Indeed, Weindling's trial counsel did not construe the remark as a comment on defendant's failure to testify, since the only objection he made at the time was that the Government may not "argue on lack

* Defendant Weindling alludes to, but does not raise as error, the Government's remark in the opening statement that the jury would "hear from the defendant's own lips. . ." (Tr. 27). After objection, Judge Owen directed the Government to proceed, at which point the Government completed the unfinished sentence, which had been interrupted by counsel's objection, by stating "Detective Minichiello will repeat words said by the very defendants". At this point the Court denied a motion for a mistrial without further comment. (Tr. 27-28). The fact that Judge Owen did not even believe a corrective instruction to the jury necessary, indicates that the remarks in context did not amount to a comment calling upon the defendant to testify.

** Defendant's reliance on *D'Ambrosio v. Fay*, 349 F.2d 957 (2d Cir.), *cert. denied*, 382 U.S. 921 (1965), and *Griffin v. California*, 380 U.S. 609, 614 (1965), is misplaced. In *D'Ambrosio* the Court held that the prosecutor's summation remarks did not violate the Fifth Amendment. *D'Ambrosio*, *supra* at 959-61. In *Griffin* the prosecutor told the jury among other things that the defendant had not seen fit to take the stand and explain or deny the evidence. *Griffin*, *supra*, at 611.

of evidence." (Tr. 750; App. 64). Moreover, the Government was "entitled to comment on a defendant's failure . . . to support his own factual theories with witnesses." *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, — U.S. — (1977), and cases cited therein. *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, — U.S. (19). Such a comment creates a constitutional issue only if the defendant alone could have testified to the evidence or the jury would "naturally and necessarily" interpret the argument as a comment on the defendant's failure to testify. *Id.* No such constitutional infirmity attached to the argument here. Weindling could have attempted to establish his theft allegation by cross-examination of the agents or through the testimony of McIntyre, who liberally took occasions to exculpate her co-defendant and assist with his defense. There was no suggestion that Weindling alone could have made the complaint. In any event there could have been no doubt in the jury's mind that a defendant need not testify since Judge Owen carefully and completely instructed the jury during voir dire and again in his charge, that a defendant need not testify. (Tr. 9-13, 812-13). *United States v. Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied, sub nom. Ostrer v. United States*, 419 U.S. 829 (1974); *Habserstroh v. Montanye*, 493 F.2d 483, 485 (2d Cir. 1974).

Defendants next argue that the prosecutor improperly put her credibility in issue with reference to the identification of Patricia Thomas as the brunette.

During defense summations it was argued that if the Government had a good case it would not have reopened the investigation into the identity of "the brunette" only two weeks prior to trial. (Tr. 718). In rebuttal, the Government, as part of its response to this "red-herring" argument, asked if it was not "better than we finally solved" that portion of the crime by identifying the brunette as Patricia Thomas. (Tr. 745-46, App. 59-60).

Defendant Weindling objected at the time and reasserts on appeal that the prosecutor put her own credibility in issue by the use of the word "we."

The reference to the prosecutor's role was merely a fair reply to the defense argument on summation and to cross-examination of the Government witnesses. During cross-examination of Detective DeRosa and Agent Sandler, defendants elicited that the investigation into the identity of the brunette had begun at the request of the prosecutor herself, and was not due to the decision of a "trained specialist." (Tr. 280-81, 362-63). Again, during summation, defense counsel reminded the jury that the prosecutor, not the police, reopened the investigation. (Tr. 713). It was the defense, not the Government, therefore, that inserted the prosecutor's role in the investigation into the case. As a result, this is not a case where the prosecutor interjected her own integrity, *United States v. Spangelet*, 258 F.2d 338, 342-43 (2d Cir. 1958), or delivered a summation characterized by foul play, improper suggestions, insinuation and assertions of personal knowledge. *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecutor merely referred to evidence brought out by defense counsel during cross-examination of the Government witnesses, and fairly responded to a collateral attack on the integrity of the Government. *United States v. Stassi*, 544 F.2d 579, 585 (2d Cir. 1976); *United States v. Tramunti*, 315 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

Defendants also urge that the prosecutor's reference in rebuttal summation to the spectrum of possible punishments faced by defendants somehow prejudiced them. This argument, as well, is made with total disregard to the defense summations to which the reply was directed. At the close of the rebuttal summation, the Government responded to the numerous references by the defense attorneys to their clients' youth and the seriousness of the charges as follows:

"I'm not denying the seriousness of the charges against them. But don't be misled by those comments of [the defense attorneys], because whether these two people, if you should find them guilty, get probation or a suspended sentence . . ." (Tr. 762-63, App. 76-77).

Before the spectrum of options open to the sentencing judge could be enumerated, Weindling's attorney objected and told the jury that the defendants faced fifteen years. (Tr. 763, App. 77). The District Judge then charged the jury that sentencing was not a matter of their concern. (Tr. 763, App. 77).

Given the repeated and emphasized appeals by the defense to the sympathies of the jury, the attempted reminder by the Government that it would be the Judge who would impose sentence on defendants, if convicted, and that the Judge would have a range of alternatives, was proper, and fully warranted. The jury's attention had been drawn to the defendants' youth and the seriousness of the charges in the defense opening (Tr. 31), and those themes were reiterated time and again in both defense summations. (Tr. 682, 686, 703, 709, 735, 737). Indeed, the jury was told that the case was about a "twenty-two year old girl who is on trial for her freedom" (Tr. 686), that the case was a "very important milestone in the young lives" of the defendants (Tr. 703), that it would "decide the course of [Weindling's] entire future life" (Tr. 735), that the jury had the "lives of two young people in [its] hands" (Tr. 737), and, in one discussion of reasonable doubt, Weindling's attorney exclaimed, "God forbid if a child of yours was on trial here" (Tr. 709). Given the oratory, the Government's summation remarks on sentencing were restrained and fully justified.

Finally, defendants claim as without factual basis in the record the prosecutor's summation argument that

Weindling was using "dealer's language" when he talked to Detective Minichiello about cutting the cocaine. (Tr. 652; App. 32). Read in the full context of the Government's summation—in which the prosecutor itemized Weindling's repeated references to obtaining money from cocaine sales with other customers and his use of such street parlance as "whack . . . up" the cocaine—it is clear that the prosecutor was merely arguing that Weindling was acquainted with the tools of his illegal business and knew what he was doing, an inference fully justified by the record. (Tr. 50-51, 57, 60). The Government's short-hand summary description of such street parlance * therefore, was neither improper nor constituted a "comment" by the prosecutor on facts outside the record.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

DENISE COTE,
 ROBERT J. JOSSEN,
*Assistant United States Attorneys,
 Of Counsel.*

* Indeed, defendants' claim of prejudice is unfathomable given the fact that Weindling's attorney personally instructed the jury in detail, with facts outside the record during his summation, regarding the use of "cut" by drug dealers, to prove that Weindling was not a dealer since he had not had any "cut" with him when arrested. (Tr. 705).

★ U. S. Government Printing Office 1978—

714—059—791

